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IN THE

Supreme Court of the United States

October Term, 1977

WARREN DONAHUE, SANDRA WEISMAN, VALDA BROMWELL, ROY G. VANASCO, JOHN T. STEWART, NICHOLAS A. LONGO, LYNDON LA ROUCHE, THE ROCKLAND COUNTY CONSERVATIVE PARTY, AND THE LABOR PARTY,

Petitioners,

against

BOARD OF ELECTIONS OF THE STATE OF NEW YORK, BOARD OF ELECTIONS OF THE CITY OF NEW YORK, SECRETARY OF THE STATE OF NEW YORK, BETTY DOLEN AND HUGH CAREY,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Opinions below

The Court of Appeals for the Second Circuit affirmed the judgment of the District Court for the Eastern District of New York without opinion on May 5, 1977. See Appendix p. 114.

The District Court issued two decisions and orders in the case. The first such decision, issued December 7, 1976 (page 60a) denied defendants' motions to dismiss and set forth that Court's view of the proper burden of proof. The second decision was issued after its hearing herein, on December 10, 1976 (page 78a).

Jurisdiction

The opinion of the Court of Appeals, which constitutes its judgment, was entered on May 5, 1977. The jurisdiction of this Court is invoked under 28 USC 1254 (1).

Questions Presented

Did the ruling by the Court below, in affirming without opinion the ruling of the District Court, affirm an erroneous interpretation of the Civil Rights Statutes 42 USC 1983 and 1985 (3) and 28 USC 1331, which is opposite to that decreed by this Court and the other Federal Circuits? Did the ruling of the Court below require a criminal level of proof in a civil case involving elections and thus undermine the ability of citizens to gain civil remedies for the dilution of their vote caused by illegal tampering with elections?

Statutes Involved

This case involves the proper construction of 28 USC 1331 and 42 USC 1983, and 1985 (3).

Statement

This is an appeal from a judgment by the Second Circuit Court of Appeals affirming a judgment by the District Court for the Eastern District of New York dismissing the complaint herein. The complaint was filed on November 22, 1976. The District Court held a hearing on November 30, 1977 on defendants'

Motions to Dismiss, and issued a decision denying said motions on December 7, 1977. That decision set the erroneous standards of proof which are the subject of this petition. After a hearing covering December 8 and 9, the Court held the standards of proof were not met, and dismissed the case on December 10. On December 17 plaintiffs filed a notice of appeal. Argument was had before the Second Circuit on May 2, 1977. The Second Circuit affirmed the Eastern District without opinion on May 5, 1977. A fuller history of the case is contained in the Appendix pp. 1a-2a and 90a-93a.

Argument

THE DECISIONS OF THE COURTS BELOW APPLIED CRIMINAL LAW STANDARDS TO A FEDERAL CIVIL RIGHTS CASE CONCERNING A TAINTED PRESIDENTIAL ELECTION. THIS IS SUCH GROSS ERROR AND GROSSLY INCONSISTENT WITH THE DECISIONS OF OTHER CIRCUITS AND OF THIS COURT, AS TO MERIT REVIEW AND REVERSAL BY THIS COURT.

The District Court required of the petitioners that in order to obtain *any* relief for the *proven* deprivation of their right to vote, they had to show that the various state officials charged with administering the election in question were, personally and knowingly, *involved* in the deprivation to an extent "approximating criminal activity." 69a

Thus, although the petitioners showed that their votes were diluted by the casting of hundreds of thousands of fraudulent and/or illegal ballots, they were denied injunctive or monetary relief by the Courts below. This decision abolishes the distinction between criminal and civil cases, and by throwing an impossible burden upon Civil litigants denies them any relief. As the petitioners amply demonstrated to the Court of Appeals (pp. 100a-113a) this is flatly in contradiction to this Court's holding in *Wood v. Strickland* 420 US 308 (1975) that:

> "An Act violating...constitutional rights can no more be justified by ignorance or disregard of settled, indisputable

law. . . than by the presence of actual malice. . .(defendants are) not immune if he knows, or reasonably should have known, that the actions he took. . .would violate the Constitutional rights. . ." 420 US at 321-322.

The Courts below disregarded the practice of the defendants in distributing post-card registrations in blocks of 10,000 and more to partisan political machines and, more disturbingly, to convicted felons and youth gangs.

There is always the possibility of criminal charges being lodged against the defendants and others for their massive dilution of the vote. *Anderson v. US* 417 US 211 (1974). But the criminal standard of proof may not be showable. That is, presumably, why civil rights laws, with their lower civil standard of proof, exist. *Compare* 18 USC 241 and 42 USC 1983. Additionally, even in the event of a successful criminal prosecution, the petitioners would receive no relief. And without compulsory immunity and other investigative tools quite properly reserved solely to the government, no plaintiff is likely to meet the criminal burden of proof required by the Courts below. In essence, those Courts repealed 42 USC 1983 in the area of vote-dilution. That is for Congress to do, if such a thing is to be done. The Courts should not undertake such repeal of legislation. See 105a-106a.

The impropriety of the decisions below is placed in startlingly clear perspective when one considers that this is a case involving a Presidential election. It has been held innumerable times that the free, equal, and undiluted exercise of the franchise is the bedrock upon which our entire structure of Constitutional liberty and development is erected. See *Williams v. Rhodes* 393 US 23 (1968) and its progeny. It would be an intolerable anomaly if a state legislature's good faith attempts to regulate the conduct of elections were to be subject to a strict-scrutiny test, while the reckless negligence of state officials in sabotaging the validity of those same elections were to be effectively immunized by the Courts. Cf. *American Party v. White* 415 US 767 (1974) with the results below, especially 67a-69a.

In summary, the petitioners showed in the District Court that the Presidential Election 1976 in New York was tainted. The

officials entrusted to safeguard the election not only failed to check registrations and otherwise prevent vote-dilution, but they positively invited such dilution by broadcasting registration forms by the hundreds of thousands. The forms, returned by the hundreds of thousands, were never checked or verified in any way whatsoever. The petitioner showed, using a valid statistical method, that *at least* 138,207 fraudulent votes, and perhaps as many as 306,108 fraudulent votes, were cast (p. 80a.). Yet, since no election official could be shown by the petitioners (private citizens who had but one month between the election and the dismissal of the complaint to prove their charges) to be *criminally* involved in this fraud, *no* relief was granted: no injunction against repetition of such invitations to fraud, no damages for dilution of their votes, no relief at all. The Trial Court held that the fraud was *insufficient* to move him to act (see 88a). Petitioners submit that any fraud of the size demonstrated herein taints the election and without assigning criminal blame, requires judicial intervention lest that tainted product poison the political bloodstream of this nation.

Conclusion

The petition for certiorari should be granted in order to establish the necessary distinction between the standards of proof to be met in civil cases and criminal cases arising under the Civil Rights Act of 1871.

Respectfully Submitted

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